89-392

Supreme Court, U.S.
FILED
SEP 7
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES
LIMITED PARTNERSHIP, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP J. BROWN (PRO SE)
2613 P Street, N.W.
Washington, D.C. 20007

WILLIAM J. BROWN (PRO SE)
2613 P Street, N.W.
Washington D.C. 20016

QUESTION PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ERRED IN DENYING PETITIONERS MOTIONS FOR VACATUR AND RECALL OF MANDATE.

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT'S REFERRAL OF PETITIONERS COUNSEL TO DISCIPLINARY BOARDS VIOLATED THE PETITIONERS' RIGHT TO AN IMPARTIAL JUDICIARY.

LIST OF INTERESTED PERSONS

The parties to the proceeding below were the Petitioners, Philip J. Brown, William J. Brown and B&W Management, Inc., and the Respondents, 1250 Twenty-Fourth Street Associates Limited Partnership and Joseph W. Kaempfer, Jr. Other interested parties include: Petitioners Bankruptcy Trustee, John W. Guinee, Jr. and his attorney Peter Kolker, Esquire; United States Trustee John Waites; American Security Bank, N.A. and its attorney, David Kuney, Esquire, and; Respondent's attorney, Richard O. Duvall, Esquire.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

LIST OF INTERESTED PERSONS ii

TABLE OF AUTHORITIES. v

OPINIONS BELOW. 2

JURISDICTION. 3

STATUTE INVOLVED. 3

STATEMENT OF THE CASE. 6

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED WHEN IT DENIED PETITIONERS' MOTION TO VACATE ORDER AND MOTION TO RECALL MANDATE. . . . 13

A. Judge Ginsburg's actual knowledge is not dispositive of the issue. 14

B. The unanimity of the panel should not preclude recall of the mandate and vacatur. 21

II. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT'S REFERRAL OF PETITIONERS COUNSEL TO DISCIPLINARY BOARDS VIOLATED THE PETITIONERS' RIGHT TO AN IMPARTIAL JUDICIARY. 26

CONCLUSION. 29

APPENDIX. App-1

TABLE OF AUTHORITIES

Case — Page(s)

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) . . . . . passim

In re Faulkner 856 F.2d 716 (5th Cir. 1988) 20

Hodosh v. Block Drug Co., Inc. 790 F.2d 880 (Fed. Cir.) cert. denied 479 U.S. 827 (1986) .22, 25

Liljeberg v. Health Services Acquisition Corp. 108 S.Ct. 2194. . . . . passim

Maier v. Orr 758 F.2d 1578 (Fed. Cir. 1985). 22, 25

Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988). . . .19

SCA Services, Inc. v. Morgan 557 F.2d 110 (7th Cir. 1977). . . .20-21

Statutes **Page(s)**

Title 28 U.S.C. Section 455. . . . . passim

Miscellaneous

1974 U.S. Cong. and Admin. News 6351. 17

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Philip J. Brown and William J. Brown (collectively referred to as "Petitioners") respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above proceeding on June 9, 1989.

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit, entered August 12, 1988, has not been reported. It is reprinted in the Appendix hereto.

The Order of the United States Court of Appeals for the District of Columbia Circuit, entered March 29, 1989, has not been reported. It is reprinted in the Appendix hereto.

The Order of the United States Court of Appeals for the District of Columbia Circuit, entered June 9, 1989, has not been reported. It is reprinted in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Appeals Court for the District of Columbia Circuit is invoked under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or

such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an official, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the

proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household. (d) For the purposes of this section the following words of phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policy-holder in a mutual insurance

company, of a depositor in a mutual savings association, or a similar propriety interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis of disqualification.

STATEMENT OF THE CASE

In late 1981, Petitioners filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Columbia. In July, 1982, the bankruptcy court appointed a Trustee to manage

debtors' property.

In November, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a set of agreements between the Kaempfer Company, as lessee, and the Petitioners, as landlord, for a ninety-nine year ground lease for valuable real estate located in Washington, D.C. The President of the Kaempfer Company is J.W. Kaempfer, Jr.

The Kaempfer Company assigned its rights to the Respondent, 1250 Twenty-Fourth Street Associates Limited Partnership. Among the partners of Respondent are:

J.W. Kaempfer, Jr. General Partner
A. James Clark
Alan Glen
Wallace F. Holladay
D&P Associates Limited Partnership
(D&P consists of attorneys from the law firm Dunnells, Duvall, Bennett & Porter)

In January of 1986, disputes arose between the parties concerning Respondent's conformity with terms of the ground lease

and Petitioners issued certain default notices to the Respondents.

Respondents then filed a motion seeking an order from the United States District Court declaring the default notices invalid and enjoining Petitioners from issuing further default notices without leave of court.

On May 13, 1986, the U.S. District Court (J. Pratt) issued an Order granting Respondents motion and a permanent injunction issued. The injunction was to last until the Respondent obtained permanent financing for the construction and development of the building on Petitioners property.

On September 8, 1987, Respondents moved that the District Court modify its injunction.

On March 21, 1988, the District Court (J. Pratt), issued an Order granting

Respondents motion to modify the injunction.

Petitioners appealed this order to the United States Court of Appeals for the District of Columbia Circuit.

On August 12, 1988, the Court of Appeals granted Respondents motion for summary affirmance of the District Court's Order.

On March 14, 1989, Petitioners filed in the Court of Appeals a Motion to Recall Mandate, Motion to Exceed Page Limits and a Motion to Vacate the August 12, 1988 Order based on the participation of Judge Ruth B. Ginsburg.

In an Order dated March 29, 1989, a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (JS. R.B. Ginsburg, Robinson and Silberman), denied Petitioners' Motion to Vacate Order and Motion to Recall Mandate.

Petitioners then filed a suggestion for

hearing en banc.

On June 9, 1989, the full court issued an Order denying the suggestion for hearing en banc and further ordered that the Petitioners counsel, Charles A. Kubinski, be referred to that court' Committee on Admissions and Grievances and to the Bar Counsel for the District of Columbia due to the "abusive nature of these filings and appellants' frequent use of this tactic."

These motions were brought as a result of the participation of Circuit Judge Ruth Bader Ginsburg on a panel on August 12, 1988 which granted the Respondents' motion for summary affirmance.

Petitioners challenged Judge Ginsburg's participation on this panel because of an appearance of impropriety and/or conflict of interest arising from her husband's law firm's representation, in an unrelated matter, of one of the Respondents herein.

Judge Ginsburg's husband is Martin D. Ginsburg, who is Of Counsel to Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank").

Since June of 1988 Fried Frank has represented The Kaempfer Company and J.W. Kaempfer, Jr., Respondents in this case, in redevelopment and renovation of the Warner Theatre ("Warner Project"). As attorneys, Fried Frank is privy to confidential commercial and financial information about The Kaempfer Company and Mr. Kaempfer.

The Warner Project is a one hundred ninety four million dollar ($194,000,000) venture which involves renovation of the Warner Theatre in Washington, D.C. and construction of 430,000 square feet of office space, 40,000 square feet of retail space and 350 parking spaces. The Kaempfer Company is the developer of the Warner Project along with Warner Theatre

Associates and J.W. Kaempfer, Jr., general partner.

The Warner Project's size, complexity and enormous monetary cost would logically demand substantial involvement by the attorneys for the principals, such as Fried Frank, and consequently the legal fees earned by Fried Frank would have to be proportionately substantial.

An adverse ruling in this case could jeopardize Kaempfer's other projects, including the Warner Project, and accordingly could affect the certainty of Fried Frank's future fees.

Attached to the Order of the Appeals Court issued in the case of J.W. Kaempfer, Jr. v. Philip J. Brown, Case No. 88-7102, dated March 3, 1989, was a statement of Circuit Judge Ginsburg (the "Statement") explaining her recusal from a panel that was to have sat in April, 1989, based upon

the information presented above.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED WHEN IT DENIED PETITIONERS' MOTION TO VACATE ORDER AND MOTION TO RECALL MANDATE.

The Order of March 29, 1989, states that the Petitioners' Motion to Vacate was denied for two reasons: Judge Ginsburg had no knowledge of the conflict and the issue was "academic" because the panel decision was unanimous. This ruling was upheld in the June 9, 1989 order of which Petitioners seek to review herein. This Court of Appeals ruling is not consistent with the doctrines established by this court in the cases of Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194, 2202 (1988) and Aetna Life Insurance Co. v. Lavoie 475 U.S. 813 (1986) nor with decisions on these issues in other circuits.

A. Judge Ginsburg's actual knowledge is not dispositive of the issue.

The Order of March 29, 1989 first refers to the Statement issued by Judge Ginsburg explaining her recusal from oral argument in J.W. Kaempfer, Jr. v. Brown Case No 88-7102. The Statement consisted of five numbered paragraphs. These five paragraphs: acknowledge Fried Frank's representation of The Kaempfer Company and Mr. Kaempfer, confirm Mr. Ginsburg's affiliation with Fried Frank, deny that either Mr. Ginsburg or Judge Ginsburg had any personal knowledge of Fried Frank's representation and indicate her withdrawal from the panel due to the connection.

The Statement does not provide the legal basis for denying the Motion to Vacate. Actual knowledge of Fried Frank's representation of Kaempfer is not a requisite for recusal under Section 455. Liljeberg v. Health Services Acquisition

Corp., 108 S.Ct. 2194, 2202 (1988). Section 455(a) requires recusal in cases where a judge's "impartiality might reasonably be questioned," not by attorneys, judges or professors, but by the average, reasonable person. Liljeberg at 2204-05. Section 455(a) intentionally omitted scienter as a requisite for recusal. Liljeberg at 2202.

Furthermore, Section 455(b)(4)(c) provides that "A Judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." Liljeberg at 2202. Although Judge Ginsburg and Mr. Ginsburg claim not to have known of Fried Frank's representation of Kaempfer, a reasonable person would and should question the failure to know of this

particular interest and consequently doubt the propriety of Judge Ginsburg's participation in matters to which Mr. Kaempfer and The Kaempfer Company was a party.

The Warner Project, as stated above, is a huge undertaking. It does not seem probable, or possible, that the addition of a client central in a two hundred million dollar real estate venture, whose demands on the resources and personnel of the firm would have been immense, would escape the attention of anyone in the firm, much less an attorney. The Warner Project and Kaempfer's involvement were widely publicized and major events occurred in the Project during the period that Judge Ginsburg was considering the motion brought by Kaempfer and his co-appellees in this case. The Ginsburgs are partners in a number of real estate development ventures

in New York and elsewhere which lends further credence to the assumption that they would be familiar with a major developer such as Kaempfer, who has developed in New York as well as Washington.

Circuit Judge Ginsburg properly recused herself from a case to which Kaempfer was a party when she said she actually became aware of the conflict, but that is not sufficient. Section 455(a) was enacted "to promote public confidence in the in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he [she] should disqualify himself and let another judge preside over the case." H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., reprinted in 1974 U.S. Cong. & Admin. News 6351, 6355. See also Liljeberg at 2201 n.7, 2202. The panel, in

relying on Judge Ginsburg's statement as a basis to deny the Motion to Vacate, does not follow the legislative intent nor the prevailing judicial interpretation of the law.

In Liljeberg, the Supreme Court stated that Judge Collins' impartiality would have been questioned "even though his failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute." Liljeberg at 2203. Mr. Ginsburg's lack of knowledge, and the consequent lack of Circuit Judge Ginsburg's knowledge, does not waive the requirement of disqualification when a conflict exists, nor does it purify the resulting tainted Order.

The panel insults the intelligence of the average person. A carpenter or school teacher or file clerk would not, we

believe, accept "I didn't know" as an explanation for the events that occurred here. The federal judge's husband, in effect, represents a party who is to appear before her, and when the issue is raised, neither the attorney knows of a major client in his firm nor does his wife the Federal judge. Both the Judge and her husband have a duty to know Fried Frank's clients and should have taken measures that would have prevented these circumstances from occurring.

Recent cases in the Fifth and Eleventh Circuits endorse and adhere to the Liljeberg standard. In Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988) the Eleventh Circuit held that Section 455(a) "embodies an objective standard." The court further deemed that the perceptions of conflict by the "disinterested lay observer" is the litmus

test for such an issue.

The Fifth Circuit ruled that a judge was disqualified, even though there was no evidence whatsoever of actual bias, because the "view of the average, reasonable person is the standard for analysis as to whether a judge shall disqualify himself or herself." In re Faulkner, 856 F.2d 716 (5th Cir. 1988). The Faulkner opinion went on to state the following, including a quote from Liljeberg:

> . . . although the view of the "reasonable person may not always be fair or even accurate, it is still the standard that must be applied: "[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of the judges. The very purpose of S 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (quoting Liljeberg at 2204-05)

In re Faulkner at 721.

The Seventh Circuit, in a case decided prior to Liljeberg, SCA Services, Inc. v.

Morgan, 557 F.2d 110 (7th Cir. 1977), ruled that a judge should have disqualified himself in a case where his brother was a partner of a firm which had entered an appearance for one of the parties. The appearance of partiality, rather than any actual knowledge or evidence of real partiality, was sufficient to warrant disqualification in that case. Furthermore, that court based its ruling on a presumption that brothers share a close relationship. SCA Services at 112. This presumption would usually apply more so to the relationship between a husband and wife.

B. The unanimity of the panel should not preclude recall of the mandate and vacatur.

The second reason given in the March 29, 1989 Order for denial of the Motion to Vacate and Motion to Recall Mandate stated

that: the question presented is academic in light of the unanimity of the panel." Order at 1. The Order does not explain its reasons for this conclusion.

In their Opposition to the Motion to Vacate, the Respondents argued that the cases of Maier v. Orr 758 F.2d 1578, 1583 (Fed. Cir. 1985) and Hodosh v. Block Drug Co., Inc., 790 F.2d 880 (Fed. Cir.), cert. denied, 479 U.S. 827 (1986) state that the result of unanimous panel decision would not be affected by retroactive disqualification of one judge. Opposition at 8-10.

Those two cases were decided prior to Liljeberg and another significant Supreme Court decision in Aetna Life Insurance Co. v. Lavoie 475 U.S. 813 (1986). The decisions of the Supreme Court in Liljeberg and Aetna have changed the approach to conflict of interest and appearance of

impropriety issues and eviscerates those earlier cases.

The Aetna court decided that a 5-4 ruling of the Alabama Supreme Court had to be vacated due to the fact that the author of the opinion had to be disqualified retroactively for a conflict of interest. The Court stated:

> Because of Judge Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Aetna at 828.

Justice Brennan filed a concurring opinion in Aetna and he argued that the leading role facet of the decision to vacate was "irrelevant." The decision of the Alabama Supreme Court was invalid simply because Judge Embry participated, not because he cast the deciding vote or wrote the opinion. Aetna at 830-31.

The deliberative process engenders

subtle forms of influence and the improper participation of one judge in the process "**necessarily** imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." Aetna at 831.

A second concurrence written by Justice Blackmun further stressed the point that Judge Embry's mere participation, rather than his leading role, deciding vote or authorship of the opinion, caused the decision to be unconstitutional:

> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events--that another justice switched his vote and that Justice Embry wrote the court's opinion--illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

Aetna at 833.

The subsequent broadening of ethical considerations in Liljeberg and the emphasis therein on the paramount importance of public perceptions indicate that the concerns expressed by Justices Brennan and Blackmun in Aetna deserve endorsement by all courts, including this Circuit. The rulings of Maier and Hodosh ignore the practical considerations of the deliberative process enumerated by Justices Blackmun and Brennan by simply subtracting the vote of a judge whose participation is improper. The discussion and debate that occur in the privacy of chambers hampers the ability of the public to determine the measure of influence each member of a panel bears. Liljeberg acknowledged the problematic nature of public opinion and ruled that the public's inherent cynicism should be assuaged. Liljeberg at 2202-03.

II. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT'S REFERRAL OF PETITIONERS COUNSEL TO DISCIPLINARY BOARDS VIOLATED THE PETITIONERS' RIGHT TO AN IMPARTIAL JUDICIARY.

The U.S. Court Of Appeals has misapprehended the applicable law. The Petitioners in this case believe that the Order of March 29, 1989 and the Order June 9, 1989 failed to uphold Section 455 and the decisions in Aetna and Liljeberg.

The Due Process rights and substantial property rights of these Petitioners can be protected in this case only if they are afforded a level playing field on which to litigate the issues.

This Court in its landmark Liljeberg decision affords these Petitioners a vehicle for insuring that they will receive the benefit of an impartial judiciary that the Constitution guarantees.

Petitioners counsel below to disciplanary bodies, effectively robbed Petitioners' of their right to an impartial forum in which to present their grievances and defend themselves from the complaints of others.

The Petitioners are faultless for the existence of financial relationships among the large developers and the members of the judiciary within the "Beltway Circuit", and should not be forced to accept circumstances which may prejudice their Constitutional and other rights.

This Court, in its Liljeberg and Aetna decisions, recognized the inherent skeptism that members of the lay public have towards the impartiality of judges. The protection afforded to and the remedies granted to the parties in those cases should be available to parties in all of the federal courts in this nation so that the goals of a fair, impartial judiciary can be achieved.

The actions of Petitioners below were taken on reliance of the strong ethical doctrines and remedies stated in the Liljeberg and Aetna decisions and it is nothing but unjust to have that reliance punished by the Court of Appeals. If those decisions are to accomplish the goal that the public may rest assured of the impartiality and integrity of the judiciary, the chilling effect of the Court of Appeals Order of June 9, 1989 must not be allowed to fester in the District of Columbia Circuit.

The unfounded reprisals levied against Petitioners' counsel have already deprived the Petitioners of the benefit of counsel for the instant petition, and the prospect of further such actions by the United States Court of Appeals for the District of Columbia Circuit effectively denies the citizens who appear before that court of

the right to exercise the rights championed by this Court.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully submit that this Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be issued.

Respectfully submitted,

Philip J. Brown (pro se)
2613 P Street, N.W.
Washington, D.C. 20007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7101 **September Term, 1988**
C.A. 86-00474

1250 Twenty-Fourth Street Associates Limited Partnership, et al.

v.

Philip J. Brown, et al.

Appellants

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges.

ORDER

Appellants Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court has requested the

taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the full Court en banc, that appellants' suggestion is denied, and, upon further consideration of the suggestion and of Appellants' Motion to Recall Mandate, filed March 14, 1989, Appellants' Motion to Vacate Order Filed August 12, 1988, filed March 14, 1989, the order of March 29, 1989, and in view of the abusive nature of these filings and appellants' frequent use of this tactic, it is

FURTHER ORDERED, by the court en banc, on its own motion, that the conduct of appellants' counsel, Charles A. Kubinski, in this matter be referred to the Court's Committee on Admissions and Grievances (Committee) and to the Bar Counsel for the District of Columbia.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:/s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald did not participate in the decision to refer the suggestion to the Committe and Bar counsel.

Circuit Judges Ruth B. Ginsburg and D.H. Ginsburg did not participate in this matter.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUN 09 1989
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7101 September Term, 1988.
C.A. 86-00474

1250 Twenty-Fourth Street Associates Limited Partnership, et al.

v.

Philip J. Brown, et al.

Appellants

BEFORE: Robinson, Ruth B. Ginsburg, and Silberman, Circuit Judges.

ORDER

Upon consideration of the appellants' Motion to Recall Mandate and Motion for Leave To File a Motion in Excess of Page Limits it is

ORDERED, by the Court, that the Clerk is directed to filed appellants' lodged Motion

to Vacate Order Filed August 12, 1988, filed March 14, 1989, and upon consideration it is

FURTHER ORDERED, by the Court, that the appellants' motion to vacate is denied. See statement of Circuit Judge Ruth B. Ginsburg attached to order of March 3, 1989, in Case No. 88-7102, para. 4 (unpublished). In addition, the question is academic in light of the unanimity of the panel in issuing the August 12, 1988 order.

The motion for recall of mandate is dismissed as moot.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:/s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED MAR 29 1989
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7101 September Term, 1987
C.A. 86-00474

1250 Twenty-Fourth Street Associates Limited Partnership, et al.

v.

Philip J. Brown, et al.

Appellants

BEFORE: Robinson, Ruth B. Ginsburg, and Silberman, Circuit Judges.

ORDER

Upon consideration of the appellees' motion for summary affirmance, the court's order to show cause, appellants motion for leave to file out of time, the oppositions and replies thereto, it is

ORDERED, that the show cause order be

discharged. It is

FURTHER ORDERED that appellants motion for leave to file out of time be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that appellees' motion for summary affirmance be granted substantially for the reasons stated in the district court's Memorandum Opinion filed March 21, 1988.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing.

Per Curiam

United States Court of Appeals
For the District of Columbia Circuit
FILED AUG 12 1988
CONSTANCE L. DUPRE
CLERK

No. 89-392

Supreme Court, U.S.
FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP J. BROWN, *et al.*,
Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

PAUL J. KIERNAN
DUNNELLS, DUVALL, BENNETT & PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1400
Counsel for Respondents 1250 Twenty-Fourth Street Associates Limited Partnership and J. W. Kaempfer, Jr., its general partner

Of Counsel:
RICHARD O. DUVALL
DUNNELLS, DUVALL, BENNETT & PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1420

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-392

PHILIP J. BROWN, *et al.*,
Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

This case arose out of an adversary proceeding before the United States Bankruptcy Court for the District of Columbia and subsequent proceedings before the District Court. The District Court issued an injunction against the Petitioners,[1] *1250 Twenty-Fourth Street Associates Limited Partnership v. Brown*, 684 F. Supp. 326 (D.D.C. 1988), which was summarily affirmed by a three-judge panel of the Court of Appeals (D.C. Cir. No. 88-7101, unpublished order filed August 12, 1988) (Robinson, Silberman, and Ruth B. Ginsburg, JJ). Seven months later, Petitioners filed a motion to recall and vacate the sum-

---

[1] The Petition for Writ of Certiorari refers to the petitioners variously as Philip J. Brown, William J. Brown, and B&W Management, Inc. Only Philip Brown appearing *pro se* has signed the petition. No counsel has appeared for any of the other putative petitioners.

mary affirmance order on the allegation that Circuit Judge Ginsburg had a "conflict of interest." The Court of Appeals denied Petitioners' motion and denied Petitioners' suggestion for *en banc* consideration. The Court also referred the conduct of Petitioners' counsel to the appropriate disciplinary authorities.

This case, like the related pending case of *Brown v. 1250 Twenty-Fourth Street Associates Limited Partnership* (No. 89-384), does not present any questions important enough to warrant review. The Petitioners' arguments are without merit and were determined to be factually and legally insufficient by the Court of Appeals. The Court below acted well within its discretion and within its authority to police its own docket and its own Bar. Because the decision below did not depart from established law and because the Court acted within its discretion on an ample factual record, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

PAUL J. KIERNAN
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1400
Counsel for Respondents
1250 Twenty-Fourth Street
Associates Limited Partnership
and J. W. Kaempfer, Jr.,
its general partner

Of Counsel:
RICHARD O. DUVALL
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1420

October 11, 1989

Supreme Court, U.S.
FILED
OCT 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

3

NO. 89-392

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES
LIMITED PARTNERSHIP, et al.,

Respondents

PETITIONER'S REPLY MEMORANDUM

PHILIP J. BROWN (PRO SE)
2613 P Street, N.W.
Washington, D.C. 20007

WILLIAM J. BROWN (PRO SE)
2613 P Street, N.W.
Washington, D.C. 20007

9 pp

TABLE OF AUTHORITIES

Case	Page(s)
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)	4
Liljeberg v. Health Services Acquisition Corp. 108 S.Ct. 2194	4, 5, 6

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-392

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, et al.,

Respondents

PETITIONERS' REPLY MEMORANDUM

Petitioners Philip J. Brown and William J. Brown hereby reply to the Brief In Opposition To Petition For Writ Of Certiorari ("Opposition") of Respondent 1250 Twenty-Fourth Street Associates

Limited Partnership ("Respondent").[1] Petitioners assert that Respondent makes a number of misleading statements as to the facts of this case and misstates the law. The Petitioners hereby submits the following to set the record straight.

ARGUMENT

First, Petitioners address Respondent's implication that Petitioners lacked diligence in this matter. Petitioners learned of the grounds upon which the motion to recall mandate and vacate the August 12, 1988 was based on March 3, 1989,

---

[1] Petitioners admittedly filed the original petition without the signature of William J. Brown. Philip J. Brown did ask for and follow the direction of the Clerk's office and believed at the time that Mr. William J. Brown was properly joined as a Petitioner as he desired. B&W Management, Inc., appellant below, also desired to be a Petitioner here but was unable to retain counsel due to the chilling effect of the decision below.

when Judge Ginsburg recused herself sua sponte from a panel scheduled to hear oral argument in Case Number 88-7102. Rather than waiting seven months to bring the motion, as Respondent asserts, Petitioners promptly and diligently filed the motion upon this recusal and release of information therein. Petitioners' rights should not be prejudiced by the passage of time during which they did not have access to vital information, information undeniably in the control of Respondent's general partner, J.W. Kaempfer, Jr. who was represented by Mr. Ginsburg's law firm. Mr. Ginsburg's law firm assisted Kaempfer in obtaining a $4 million HUD-UDAC grant and received, at minimum, a $50,000 legal fee.

Furthermore, Petitioners did not "allege" that Judge Ginsburg had a "conflict of interest". Judge Ginsburg

herself acknowledged the conflict of interest when she recused herself from Case Number 88-7102. Her subsequent abstention in matters involving these parties confirms that she believed she had a conflict.

While the order denying Petitioners' motions below relied on Judge Ginsburg's claimed lack of actual knowledge in August, 1988, Petitioners believe that this ruling was erroneous. Petitioners do not believe that the applicable standard of law requires that Judge Ginsburg knew of the conflict of interest at the time, but that she should have known.

Contrary to Respondent's characterization, Petitioners do assert that a factual basis is required for judicial disqualification. That factual basis has been met here.

Petitioners also asserts the D.C. Court of Appeals has misread this Court's

landmark rulings in Liljeberg v. Health Services Acquisition Corp. 108 S.Ct. 2194 and Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986).

The Liljeberg doctrine does not require absolute proof that a judge was aware of the conflict but rather whether an objective, reasonable person would think that she should have known. Obviously, Judge Ginsburg and her husband should have known of the facts for which she has disclaimed knowledge. Liljeberg stressed that it was appearances to the ordinary, reasonable person which were crucial to judicial inquiry.

Petitioners and other litigants should not be deprived of the ability to retain counsel when they feel deprived of their rights, nor should counsel duly retained be stripped of the ability to vigorously defend those rights by threats of

unwarranted reprisals by any court. Respondent cites no facts or law to controvert Petitioners' documented proof and case law created by this Court, and neither has the D.C. Circuit Court of Appeals.

Concerns about judicial impartiality threaten a fundamental right under the Constitution. Infringement of this right affects all as it affects one. The members of this Court have shown adherence to the concept of impartiality through numerous individual instances of sua sponte recusals and the issuance of the landmark Liljeberg ruling. The issues presented by Petitioners herein addresses this fundamental concern and warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, and those contained in their original petition,

Petitioners respectfully submit that their Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be issued.

Respectfully submitted,

Philip J. Brown (pro se)
2613 P Street, N.W.
Washington, D.C. 20007

William J. Brown (pro se)
2613 P Street, N.W.
Washington, D.C. 20007